Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition for Expedited Rulemaking of	)	RM 9101
LCI International Telecom Corp. and	)	
Competitive Telecommunications Association	)	
to Establish Reporting Requirements and	)	
Performance and Technical Standards for	)	
Operations Support Systems	)	

REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

INTRODUCTION

The United States Telephone Association ("USTA") hereby files these reply comments in response to the Commission's Public Notice regarding the LCI and CompTel Petition for Expedited Rulemaking ("Petition") involving Operations Support Systems ("OSS").[1] USTA is the principal trade association for the local exchange carrier industry.

The LCI/CompTel Petition was filed before the Commission under the assumption that the Commission has jurisdiction to review Operations Support Systems ("OSS") agreements negotiated between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"), or to enforce the terms and conditions set forth in these agreements. Specifically, LCI/CompTel requested that the Commission adopt national performance and

[1] Public Notice DA No. 97-1211 released June 10, 1997.

technical standards for incumbent LECs to meet in provisioning access to OSS functions for preordering, ordering, billing, provisioning, maintenance and repair.[2]

As USTA stated in its comments, the Commission lacks jurisdiction to impose national performance and technical standards because parties are required to negotiate agreements, submit unresolved issues to state commissions for resolution, and if necessary, seek judicial review under Section 252(e)(6) of the Telecommunications Act of 1996 ("Act").[3] The July 18, 1997 decision of the United States Court of Appeals for the Eighth Circuit ("Court") affirms USTA's positions.[4] Based upon the decision in this case, which clearly preserves implementation and review of interconnection, unbundling of network elements, and resale agreements to state commissions and federal district courts, the Commission unequivocally lacks the authority to grant the relief requested in the LCI/CompTel Petition. Therefore, this proceeding should be terminated in accordance with the decision of the Eighth Circuit Court of Appeals.

STATE COMMISSIONS AND FEDERAL DISTRICT COURTS HAVE EXCLUSIVE JURISDICTION OVER IMPLEMENTATION ISSUES REGARDING OSS

In its comments in this proceeding, USTA stated:

> Unless the LCI/CompTel Petition addresses claims or allegations in which a state commission failed to act regarding OSS issues, Section 252(e)(6)

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2 *LCI/CompTel Petition for Expedited Rulemaking* filed May 30, 1997.

3 *See* USTA Comments filed July 10, 1997.

4 *See Iowa v. FCC*, No. 96-3321 (8th Cir. filed July 18, 1997).

> makes clear that the Commission should take no action to impede the authority of state commissions to act. Section 252(e)(6) of the Act provides that Commission action, and subsequent judicial review, is the sole remedy "In a case in which a State fails to act as described in 252(e)(5)."[5] Therefore, the clear intent of the Act is that the Commission should take no action regarding CLECs' nondiscriminatory access to OSS functions where state commissions have issued orders approving voluntary or arbitrated agreements between parties on a case-by-case basis.[6]

The Court affirmed the Commission's position that OSS must be provided as unbundled network elements which ILECs must provide upon request under Sections 251(c)(3)[7] of the Act.[8] Yet, throughout the Court's decision, the Commission's claim of jurisdictional authority to review complaints filed by CLECs regarding agreements implementing the requirements of the Act, or enforcing terms and conditions of agreements between ILECs and CLECs, were rejected.

Regarding Commission authority to hear complaints under Section 208[9], the Court clearly rejected this argument:

> The language and design of the Act indicate that the FCC's authority under section 208 does not enable the Commission to review state commission determinations or to enforce the terms of interconnection agreements under the Act. Instead, subsection 252(e)(6) directly provides for federal district court review of state commission determinations when parties wish to challenge such determinations.... The FCC responds by arguing that federal district court review under subsection 252(e)(6) is not the exclusive remedy for a party aggrieved by state commission decisions under the Act and that such a party has the option of also filing a Section

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5 47 U.S.C. §252(e)(6).

6 USTA Comments at 19-20.

7 47 U.S.C. §251(c)(3) (access to network elements on an unbundled basis).

8 *See Iowa v. FCC* at 130-135.

9 47 U.S.C. §208.

> 208 complaint with the FCC. Although the terms of subsection 252(e)(6) do not explicitly state that federal district court review is a party's "exclusive" remedy, courts traditionally presume that such special statutory review procedures are intended to be the exclusive means of review ....
>
> We afford subsection 252(e)(6) our traditional presumption and conclude that it is the exclusive means to attain review of state commission determinations under the Act. Additionally, the complete absence of any reference to section 208 in the Act bolsters our conclusion that Congress did not intend to allow the FCC to review the decisions of state commissions.[10]

Not only did the court find that Section 208 does not provide the Commission with authority to hear complaints about state commission decisions, the Commission is without authority to enforce the substantive terms of agreements made pursuant to Sections 251 and 252. The Court's reasoning is based again on the plain meaning of the Act:

> We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved. Moreover, the state commissions' enforcement power extends to ensuring that parties comply with the regulations that the FCC is specifically authorized to issue under the Act, because the Act empowers state commissions to reject arbitrated agreements on the basis that they violate the FCC's regulations .... §252(e)(2)(B). Again we believe that the power to approve or reject these agreements based on the FCC's requirements includes the power to enforce those agreements. Significantly, nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of sections 251 and 252. The only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act. The FCC's expansive view of its authority under section 208 is thus

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[10] *Id.* at 121-122.

contradicted by the language, structure, and design of the Act.[11]

The Court's decision also dismisses arguments that the Commission's jurisdictional reach to impose, review or enforce the terms of agreements made pursuant to Sections 251 and 252 are made any more salient by Section 2(b).[12] According to the Court:

> The FCC's interpretation of its authority under section 208 also cannot survive the operation of Section 2(b).... [T]he obligations imposed by sections 251 and 252 fundamentally involve local intrastate telecommunications matters. Consequently, the state commission determinations that the FCC seeks to review and the agreements that it seeks to enforce also fundamentally deal with intrastate telecommunications matters. To reiterate, section 2(b) prevents the FCC from having jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services...." Allowing the FCC either to review state commission determinations regarding agreements implementing sections 251 and 252 or to enforce the terms of such agreements effectively would provide the FCC with jurisdiction over intrastate communication services in contravention of section 2(b).... We conclude that the language and structure of the Act combined with the operation of section 2(b) indicate that the provision of federal district court review contained in subsection 252(e)(6) is the exclusive means of obtaining review of state commission determinations under the Act and that state commissions are vested with the power to enforce the terms of the agreements they approve.[13]

Performance standards and technical requirements for OSS involve intrastate telecommunications services that ILECs and CLECs must negotiate. As the Court's decision makes abundantly clear -- based on its reading of Section 2(b) of the Act -- "charges,

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11 *Id.* at 122.

12 47 U.S.C. §152(b).

13 *Id.* at 123.

classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services" are beyond the authority of the Commission to impose, review and enforce. Therefore, the imposition of national performance standards and technical requirements would "thwart" the voluntary negotiation process which the Court recognized Congress intended the parties to pursue,[14] and would likewise empower the Commission with jurisdiction over matters which the plain language of the Act and statutory provisions which predate the Act reserve to state commissions.

The Court also devotes an entire section of its decision rejecting the Commission's view that its decisions are binding on the states even with respect to interconnection matters.[15] As the Court held, the Commission's interpretation is inconsistent with Section 251(d)(3)[16] of the Act which preserves state commissions' authority to establish access and interconnection obligations so long as the state commission order "(1) is consistent with the requirements of section 251 and (2) does not substantially prevent the implementation of the requirements of section 251 and the purposes of Part II, which consists of sections 251 through 261."[17] Moreover, the Court stated that "it is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II."[18] As the Court

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14 *Id.* at 116.

15 *Id.* at 126-129.

16 47 U.S.C. §251(d)(3).

17 *Iowa v. FCC* at 127.

18 *Id.*

concluded: "the FCC's belief that merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient for the FCC to preempt the state rule, is an unreasonable interpretation of the statute in light of subsection 251(d)(3) and the structure of the Act."[19]

The Court's ruling is clear. The Commission has no authority to review or enforce the terms of state approved agreements.[20]

CONCLUSION

As USTA stated in its comments, the Commission has consistently recognized that there is no need for national standards because state commissions have taken the lead in establishing terms and conditions for access to OSS functions. With the passage of the Act, the record is clear that ILECs have an exemplary record in negotiating agreements with CLECs.[21]

It is important to reiterate, however, that the local public switched telecommunications

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[19] *Id.* at 129.

[20] USTA believes that pending cases in which the Commission has been requested by CLECs to review other state commission decisions or impose regulations that interfere with state commissions' authority to approve and enforce the terms of agreements must also be terminated, or limited to matters the Court held are within the Commission's jurisdiction. *See, e.g., In the Matter of MFS Communications Company, Inc., Petition for Preemption and Declaratory Ruling Regarding Geographical Deaveraging*, CCB/CPD 97-1. Again, as here, USTA argued that the Commission lacked jurisdiction to review state commission orders on geographic rate deaveraging, citing Section 252(e)(6). *See* USTA Comments at 4-5 (February 7, 1997); Reply Comments at 4 (February 24, 1997). *See also,* Public Notice DA 97-1519 released July 18, 1997 regarding the Common Carrier Bureau's request for *Recommendations on Commission Actions Critical to the Promotion of Efficient Local Competition*, CCBPol 97-9, released July 18, 1997.

[21] USTA Comments at 15-16.

network consists of a network-of-networks comprised of ILECs who come in all shapes and sizes, including mid-size, small and rural carriers with different network architectures and support systems, and varied financial and technical capabilities. A continuing theme during the FCC's recent forum on OSS was the complexity faced by ILECs in meeting the demands of CLECs. What complicates the process is that CLECs, too, have different network architecture and OSS needs which can only be addressed as Congress intended -- through one-on-one negotiations, with unresolved issues arbitrated before state commissions, leading to approval of comprehensive binding contracts. This fundamental process is working as evidenced by the hundreds of agreements reached between ILECs and CLECs and approved by state commissions across the country. In addition, industry groups continue their work to develop technical standards and protocols that may prove useful.

The entire ILEC industry is also digesting hundreds of pages of Commission Orders, new federal regulations, and scores of state regulations to implement the requirements of the Act in furtherance of local competition. ILECs are faced with tremendous demands for negotiated agreements with CLECs, each with unique network and support system needs, requiring unprecedented commitments to ensure compliance with these regulatory requirements. Under the circumstances, additional federal regulations regarding OSS are unnecessary.

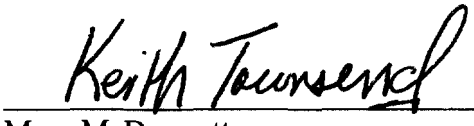
The Commission also has no authority to impose national performance and technical standards involving OSS. State commissions have been entrusted by Congress, through the Act, to approve private agreements, impose additional terms and conditions, and ensure that agreements are enforced. By statute, only federal district courts may review decisions of state commissions decided under the Act. USTA urges the Commission to bring closure to this

proceeding and other Commission activity which exceed its jurisdiction and focus its attention and resources on those issues within its jurisdiction.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

July 30, 1997



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